90-1988

Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1990

ROY LAWRENCE PAYNE and
JESUS JOSE MEDRANO-PEREZ,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

JOINT PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER THE TRIAL COURT ERRED IN INTERPRETING AND APPLY THE *FEDERAL SENTENCING GUIDELINES* AS TO REQUIRE THE CALCULATION OF THE BASE AND INCREMENTAL OFFENSE LEVELS FROM OFFENSES OTHER THAN THE OFFENSE OF CONVICTIONS.

II. WHETHER THE *FEDERAL SENTENCING GUIDELINES* ARE UNLAWFUL, INVALID, AND UNCONSTITUTIONAL TO THE EXTENT THAT THEY REQUIRE CALCULATION OF FINE, IMPRISONMENT, AND RESTITUTION TO BE BASED ON OFFENSE OTHER THAN THE OFFENSE OF CONVICTION.

III. WHETHER THE *FEDERAL SENTENCING GUIDELINES* VIOLATE DUE PROCESS TO THE EXTENT THEY REQUIRE CALCULATION OF FINE, IMPRISONMENT, AND RESTITUTION TO BE BASED ON OFFENSE OTHER THAN THE OFFENSE OF CONVICTION.

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

JOINT PETITION FOR WRIT OF CERTIORARI

ROY LAWRENCE PAYNE and JESUS JOSE MEDRANO-PEREZ, Petitioners herein, by and through their appellate attorney of record, CHARLES LOUIS ROBERTS, hereby petitions this Court to grant a Joint Petition Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

CITATIONS TO OPINIONS BELOW

The denial of rehearing by the United States Court of Appeals for the Fifth Circuit in *United States v. Roy Lawrence Payne and Jesus Jose Medrano-Perez,* Nos. 90-8211 and

90-8218 was entered on March 25, 1991; and this Order is reproduced herein as App. 14. The Opinion of the panel of the United States Court of Appeals for the Fifth Circuit in *United States v. Roy Lawrence Payne,* No. 90-8211 was entered as an unpublished Slip Opinion on February 4, 1991, and is reproduced herein as App. 8 and *United States v. Jesus Jose Medrano-Perez,* No. 90-8218 was entered as an unpublished Slip Opinion on February 4, 1991, and is reproduced herein as App. 1.

JURISDICTION

The denial of rehearing by the United States Court of Appeals for the Fifth Circuit was entered on March 25, 1991. This Petition is timely filed within ninety (90) days of March 25, 1991, pursuant to Supreme Court Rule 20.01. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTORY PROVISIONS AND RULES INVOLVED

1. The United States Constitution Amendment V reads as follows in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .
>
> ***United States Constitution, Amendment V***

2. The United States Code, 28 U.S.C. § 991 reads as follows:

§ 991. United States Sentencing Commission; establishment and purposes

(a) There is established as an independent commission in the judicial branch of the United States a United States Sentencing Commission which shall consist of seven voting members and one nonvoting member. The President, after consultation with representatives of judges, prosecuting attorneys, defense attorneys, law enforcement officials, senior citizens, victims of crime, and others interested in the criminal justice process, shall appoint the voting members of the Commission, by and with the advice and consent of the Senate, one of whom shall be appointed, by and with the advice and consent of the Senate, as the Chairman. At least three of the members shall be Federal judges selected after considering a list of six judges recommended to the President of the Judicial Conference of the United States. Not more than four of the members of the Commission shall be members of the same political party. The attorney General, or his designed, shall be an *ex officio,* nonvoting member of the Commission. The Chairman and members of the Commission shall be subject to removal from the Commission by the President only for neglect of duty or malfeasance in office or for other good cause shown.

(b) The purposes of the United States Sentencing Commission are to . . .

(1) establish sentencing policies and practices for the Federal criminal justice system that –

(A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;

(B) provide certainty and fairness in meeting the purposes of sentencing, avoiding

unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and

(C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process; and (2) develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code. **[Emphasis supplied].**

28 U.S.C. § 991

3. The United States Code, 28 U.S.C. § 3553 reads as follows:

§ 3553. Imposition of a sentence.

(a) Factors to be considered in imposing a sentence. – **The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2)** of the subsection. The court, in determining the particular sentence to be imposed, shall consider –

(1) The nature and circumstances **of the offense** and the history and characteristics of the defendant;

(2) the need for the sentence to be imposed –

(A) to reflect the seriousness **of the offense,** to promote respect for the law, and to provide just punishment **for the offense;**

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational

or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines that are issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1) and that are in effect on the date the defendant is sentenced;

(5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced;

(6) the need to avoid unwarranted sentence disparities among defendants with similar records **who have been found guilty of similar conduct;** and

(7) The need to provide restitution to any victims **of the offense.** [Emphasis supplied]

18 U.S.C. § 3553

4. The *Federal Sentencing Guidelines,* § 1B1.3 reads as follows:

§ 1B1.3 ***Relevant conduct (Factors that Determine the Guideline Range)***

(a) *Chapters Two (Offense Conduct) and Three (Adjustments).* Unless otherwise specified,

(i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

(1) all acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense, or that otherwise were in furtherance of that offense;

(2) solely with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts, all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction;

(3) all harm that resulted from the acts or omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts or omissions; and

(4) any other information specified in the applicable guideline.

(b) *Chapters Four (Criminal History and Criminal Livelihood) and Five (Determining the Sentence).* Factors in Chapters Four and Five that establish the guideline range shall be determined on the basis of the conduct and information specified in the respective guidelines.

Federal Sentencing Guidelines Manual
at p. 18

STATEMENT OF THE CASE

The count of the Indictment to which the Appellant pled dealt solely with a quantity of 300 pound (136 Kilograms) of marijuana:

SIXTH COUNT
(21 U.S.C. § 841(a)(1))

> That on or about September 7, 1989, and continuing thereafter, up to and including on or about September 10, 1989, in the Western District of Texas, Defendants,
>
> VICTOR HUGO,
> **JESUS JOSE MEDRANO-PEREZ,**
> ROY LAWRENCE PAYNE, JR.,
> LEONEL PEREZ,
> MARGARITA MARTINEZ-PEREZ,
>
> unlawfully, knowingly, and intentionally did possess with intent to distribute a quantity of more than 50 kilograms of marijuana, a Schedule I Controlled Substance, in violation of Title 21, United States Code, Section 841(a)(1).
>
> ***Indictment***
> **(R R 9)**

In spite of the fact that the Petitioners had plead only to Count 6, the Presentence Report ("P.S.I.") considered the total amount of marijuana and totaled all quantities of all counts to reach the total of 1,834 pounds (835 kilograms). For example, MEDRANO's P.S.I. reads as follows:

28. Base Offense Level:

1. Under Sec. 1B1.3(a)(1): Defendant MEDRANO is accountable for the possession of marijuana described in Count 6. The quantity was 300 pounds (136 Kilograms). Defendant MEDRANO was one of those who possessed the marijuana.

2. Under Sec. 1B1.3(a)(2): Defendant MEDRANO is accountable for the possession of the marijuana which he and his brother, Defendant HUGO, had in Juarez on about 09-07-89 and employed Defendant PAYNE to move into El Paso, the house at 11169 Paducah Avenue. The quantity was 1,600 pounds (725 kilograms). The importation and possession of 300 pounds of such marijuana is described in Counts 5 and 6. The possession of the 1,600 pounds was part of the same course of conduct or common scheme or plan, as MEDRANO's offense of conviction.

3. Under Sec. IB1.3(a)(2): Defendant MEDRANO is accountable for the importation and possession of marijuana described in Counts 3 and 4. The quantity was 243 pounds (110 kilograms). Such importation and possession was part of the same course of conduct, or common scheme or plan, as MEDRANO's offense of conviction, and was reasonably foreseeable by MEDRANO.

The total quantity of marijuana for which Defendant MEDRANO is accountable is 1,843 pounds (835 kilograms). Sec. 2D1.1(a)(3) and (c)(7). *30*

Presentence Report,
¶¶28(1), 28(2), 28(3) at pp. 9, 10

Before sentencing, both Petitioners' counsel objected, *(R III 25 et seq)*, to the inclusion of the other quantities of marijuana from the dismissed counts on appeal, the Petitioners asserted that it was a due process violation to include the extraneous amounts, Appellant's *Brief* (Medrano) at p. 19.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. THE TRIAL COURT ERRED IN INTERPRETING AND APPLY THE *FEDERAL SENTENCING GUIDELINES* AS TO REQUIRE THE CALCULATION OF THE BASE AND INCREMENTAL OFFENSE LEVELS FROM OFFENSES OTHER THAN THE OFFENSE OF CONVICTIONS.

II. THE *FEDERAL SENTENCING GUIDELINES* ARE UNLAWFUL, INVALID, AND UNCONSTITUTIONAL TO THE EXTENT THAT THEY REQUIRE CALCULATION OF FINE, IMPRISONMENT, AND RESTITUTION TO BE BASED ON OFFENSE OTHER THAN THE OFFENSE OF CONVICTION.

III. THE *FEDERAL SENTENCING GUIDELINES* VIOLATE DUE PROCESS TO THE EXTENT THEY REQUIRE CALCULATION OF FINE, IMPRISONMENT, AND RESTITUTION TO BE BASED ON OFFENSE OTHER THAN THE OFFENSE OF CONVICTION.

I. ***Reasons Why The Writ Should Be Granted:***

1. ***United States v. Hughey*, 110 S.Ct. 1979 (1990): 28 U.S.C. § 991 and 18 U.S.C. § 3553:**

The Petitioners assert that they were sentenced on the basis of Federal Sentencing Guideline regulations which appear to both allow and require the sentencing court to go beyond the offense of conviction. The Petitioners assert that the seminal case of *United States v. Hughey*, 110 S.Ct. 1979 (1990) practically requires a decision for the Petitioners. This is because *Hughey* conducted its own examination of "an offense" and found that unless otherwise specified by statute, such phrase means only the offense of conviction:

> As in all cases involving statutory interpretation, we look first to the language of the statute itself. *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685, 105 S.Ct. 2297, 2301, 85 L.Ed.2d 692

(1985). Title 18 U.S.C. § 3579(a)(1) (1982 ed., Supp. IV) provides that "a defendant convicted of an offense" may be ordered to "make restitution to any victim of such offense." Other subsections of § 3579 likewise link restitution to the offense of conviction. See § 3579(b)(1) (listing damages recoverable "in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense"); § 3579(ab)(2) (listing damages recoverable "in the case of an offense resulting in bodily injury to a victim"); § 3579(b)(3) (listing damages recoverable "in the case of an offense resulting in bodily injury [that] also results in the death of a victim"). As the Government concedes, Brief for United States 14, a straight forward reading of the provisions indicates that the reference of "such offense" and "an offense" is the offense of conviction. Given that the ordinary meaning of "restitution" is restoring someone to a position he occupied before a particular event, see, e.g., Webster's Third New International Dictionary 1936 (1986); Black's Law Dictionary 1180 (5th ed. 1979), the repeated focus in § 3579 on the offense of which the defendant was convicted suggests strongly that restitution as authorized by the statute is intended to compensate victims only for losses caused by the conduct underlying the offense of conviction. * * * More significantly, § 3580(a)'s catchall phrase does not reflect a congressional intent to include in the restitution calculus losses beyond those caused by the offense of conviction. Section 3580(a) sets forth the considerations for "determining whether to order restitution under section 3579 of this title and the amount of such restitution." The first such consideration is "the amount of loss sustained by any victim as a result of the offense." ***This language suggests persuasively that Congress intended restitution to be tied to loss caused by the offense of conviction.*** Indeed,

> had Congress intended to permit a victim to recover for losses stemming from all conduct attributable to the defendant, including conduct unrelated to the offense of conviction, ***Congress would likely have chosen language other than "the offense," which refers without question to the offense of conviction. See supra, at ___.*** [Emphasis Supplied]
>
> ***Hughey v. United States,***
> **110 S.Ct. 1979, 1982-1983 (1990)**

Hughey has direct application to the Federal Sentencing Guidelines Authorization Statute, 28 U.S.C. § 991 and the Sentence Imposition Statute, 18 U.S.C. § 3553. It is important to realize that the Federal Sentencing Guidelines were promulgated by the Federal Sentencing Commission and are subordinate to the statutes. This point has been made by the authors of the sentencing guidelines system itself.

> The sentencing guidelines system will not remove all of the judge's sentencing discretion. Instead, it will guide the judge in making his decision on the appropriate sentence. Under guidelines sentencing the court retains its traditional responsibility to insure that the agency regulations comply with the authorizing statute. Where the court concludes that the guidelines do not comply with the Act, it will have to derive the appropriate sentence from the [f]actors to be considered in imposing a sentence set forth in 18 U.S.C. § 3553(a). . . . Memorandum, Judicial Conference Committee on Criminal Law and Probation Administration, at 4-5 (May 1988).
>
> **S.Rep. No. 225, 98th Cong.,**
> **1st Sess. 51 (1983).**

Clearly, the Guidelines are absolutely subordinate to the two laws which establish the authority of the Commission and define its objectives and limits which are 28 U.S.C. § 991 and 18 U.S.C. § 3553. 28 U.S.C. § 991 authorizes the Federal Sentencing Commission but limits its authority to the purposes and parameters set forth in the Sentence Imposition Statute in 18 U.S.C. § 3553; § 991 reads as follows:

> § 991. United States Sentencing Commission; establishment and purposes
>
> (a) There is established as an independent commission in the judicial branch of the United States a United States Sentencing Commission which shall consist of seven voting members and one nonvoting member. The President, after consultation with representatives of judges, prosecuting attorneys, defense attorneys, law enforcement officials, senior citizens, victims of crime, and others interested in the criminal justice process, shall appoint the voting members of the Commission, by and with the advice and consent of the Senate, one of whom shall be appointed, by and with the advise and consent of the Senate, as the Chairman. At least three of the members shall be Federal judges selected after considering a list of six judges recommended to the President of the Judicial Conference of the United States. Not more than four of the members of the Commission shall be members of the same political party. The Attorney General, or his designed, shall be an *ex officio,* nonvoting member of the Commission. The Chairman and members of the Commission shall be subject to removal from the Commission by the President only for neglect of duty or malfeasance in office or for other good cause shown.

(b) The purposes of the United States Sentencing Commission are to . . .

(1) establish sentencing policies and practices for the Federal criminal justice system that –

(A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;

(B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records ***who have been found guilty of similar criminal conduct*** while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and

(C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process; and (2) develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code. **[Emphasis supplied].**

28 U.S.C. § 991

By limiting the authority of the Commission to the purposes and parameters of 18 U.S.C. § 3553, the old sentencing law case of *Hughey,* 877 F.2d 1256 (5th Cir. 1989) becomes directly applicable to the Federal Sentencing Guidelines. 18 U.S.C. § 3553 uses the language again and again which has been interpreted by *Hughey* to mean ***only*** the offense of conviction and not other charged or uncharged conduct.

§ 3553. Imposition of a sentence.

(a) Factors to be considered in imposing a sentence. – **The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2)** of this subsection. The court, in determining the particular sentence to be imposed, shall consider

(1) The nature and circumstances **of the offense** and the history and characteristics of the defendant,

(2) the need for the sentence to be imposed –

(A) to reflect the seriousness **of the offense,** to promote respect for the law, and to provide just punishment **for the offense;**

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines that are issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1) and that are in effect on the date of defendant is sentenced;

(5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced;

(6) the need to avoid unwarranted sentence disparities among defendants with similar records **who have been found guilty of similar conduct;** and

(7) the need to provide restitution to any victims **of the offense.** [Emphasis supplied]

18 U.S.C. § 3553

Nowhere in 18 USC § 3553 does it allow the sentencing guidelines to go beyond the nature and circumstances of "the offense", "of conviction"; to impose a sentence which reflects "the seriousness of", "offenses other than conviction"; "to do other than provide just punishment for the offense [of conviction]", etc. Indeed, the statute goes on to say that there is a need to avoid disparities in sentencing among defendants with similar records who had been found guilty of similar conduct. This provision ignores relevant conduct as does the rest of the act and focuses on the offense for which the Defendant was found guilty like the rest of the act. As a final test, of whether *Hughey* should be applied, one need only wonder how the Supreme Court can consistently interpret paragraph seven of 18 U.S.C. § 3553 as being other than the same limitation of restitution to the offense of conviction as in the old sentencing law. The Federal Sentence Commission is not Congress and cannot go beyond the authorization of Congress and thus must confine itself to calculating sentences as well as restitution based only on the offense of conviction and not on uncharged conduct.

However, the Petitioners assert that because of the restrictive language of the statutes which authorized and enabled the Federal Sentencing Commission to issue the

above regulations, that they may only be sentenced on the basis of their ***offense of conviction.*** In this case, this would mean a sentence which would be based on the 300 pounds of marijuana involved in the count to which they plead guilty, instead of the 1800 pounds involved in extraneous offenses both in and outside the remaining counts of the indictment.

2. ***18 U.S.C. § 3661:***

Now it can be said that Federal Trial Courts have unlimited discretion with the statutory minimum and maximum sentences and the authority to consider any information to arrive at a sentence within that range:

> No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.
>
> **18 U.S.C. § 3661**

However, it must be also admitted that the *Federal Sentencing Guidelines* have the effect of limiting the discretion in sentencing and utilization of information mentioned in 18 U.S.C. § 3661, "receive" and "consider". Actually, Counsel argue that the promulgation of 28 U.S.C. 991 and 18 U.S.C. § 3553 expressly limit the unfettered use of information and unfettered discretion contained in a broad reading of the language of 18 U.S.C. § 3661. Indeed the legislative history of the Sentencing Reform Act, etc., reveals that this was indeed the purpose for the Act itself. Perhaps one must have to read Section 3661 as allowing the Court to get any information in setting a sentence. If

we read 18 U.S.C. § 3661, as absolutely forbidding any limitations on what information the Court receives and considers, then major portions of the Federal Sentencing Guidelines are in direct conflict with this statute. The widest possible reading would allow departures at will and destroy the uniformity sought in the *Federal Sentencing Guidelines.* Indeed major portions of the *Federal Sentencing Guidelines* are nothing more than blatant restrictions on factors that a court should consider in determining the appropriate sentence, Section 541 et seq. of the *Federal Sentencing Guidelines* is a prime example of such limitations:

> 5H1.1 Age (Policy Statement)
>
> Age is not ordinarily relevant in determining whether a sentence should be outside the guidelines. Neither is it ordinarily relevant in determining the type of sentence to be imposed when the guidelines provide sentencing options.
>
> ***Federal Sentencing Guidelines,***
> **§ 5H1.1**
>
> 5H1.2 Education and Vocational Skills (Policy Statement)
>
> Education and vocational skills are not ordinarily relevant in determining whether a sentence should be outside the guidelines. * * * Neither are educational and vocational skills relevant in determining the type of sentence to be imposed when the guidelines provide sentencing options.
>
> ***Federal Sentencing Guidelines,***
> **§ 5H1.2**
>
> 5H1.4 Physical Condition, Including Drug Dependence and Alcohol Abuse (Policy Statement)

> Physical condition is not ordinarily relevant in determining whether a sentence should be outside the guidelines or where within the guidelines a sentence should fall. However, an extraordinary physical impairment may be a reason to impose a sentence other than imprisonment.
>
> ***Federal Sentencing Guidelines,***
> **§ 5H1.4**

In addition,

> 357 The Introductory Commentary to Chapter Five, Part H is amended by inserting the following paragraph at the end:
>
> In addition, 28 U.S.C. § 994(e) requires the Commission to assure that its guidelines and policy statements reflect the general inappropriateness of considering the defendant's education, vocational skills, employment record, family ties and responsibilities, and community ties in determining whether a term of imprisonment should be imposed or the length of a term of imprisonment.
>
> **1988-1900 AMENDMENTS**
>
> This amendment clarifies the relationship of 28 U.S.C. § 994(e) to certain of the policy statements contained in this part. The effective date of this amendment is November 1, 1990.
>
> ***Federal Sentencing Guidelines,***
> **Appendix C 357**

Thus, if 18 U.S.C. § 3553 is a valid restriction of the receipt and use of information by a trial court under the *Federal Sentencing Guidelines,* then this Court's *Hughey* decision forecloses the issue and restricts sentencing on the basis of the offense of conviction only.

3. *Specific Reasons Why The Writ Should Be Granted*

Literally thousands of United States citizens are sentenced annually pursuant to the *Federal Sentencing Guidelines*. Whether or not the *Federal Sentencing Guidelines* are the result of the Federal Sentencing Commission exceeding its authorization and limitation promulgated by Congress in 18 U.S.C. § 3553 and 28 U.S.C. § 991 should be determined at the earliest practical moment. The prospect of undoing and redoing tens of thousands federal sentencings is too daunting to imagine. The finality and the justice of these sentences will be perpetually in question until the questions raised herein are addressed and decided by this Court.

CONCLUSION AND PRAYER

WHEREFORE, THE ABOVE PREMISES CONSIDERED, Petitioners pray that this Court grant a Petition for Certiorari to the United State Supreme Court and thereafter vacate their sentences and remand their causes for resentencing pursuant to *United States v. Hughey,* supra.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-8218
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JESUS JOSE MEDRANO-PEREZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(EP 89 CR 371 "G")

(February 4, 1991)

Before KING, GARWOOD and DUHE, Circuit Judges.

PER CURIAM:*

Jesus Medrano-Perez (Medrano-Perez) pleaded guilty to possession with intent to distribute marijuana, which was the sixth count of a 7-count indictment. 21 U.S.C.

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

§ 841(a)(1). The government dismissed the remaining charges. Medrano-Perez appeals his sentence under the United States Sentencing Guidelines (Guidelines).

I.

The Presentence Investigation Report (PSI) determined that from December 1988 through September 1989, Medrano-Perez was involved in a conspiracy with co-defendants Victor Hugo Medrano,[1] Roy Payne, Leonel Perez, and Margarita Martinez. Medrano-Perez's base offense level was set in the PSI at 30, in part because 1,843 pounds of marijuana were attributed to him. His base level was increased by 4 because he was an organizer or leader of the criminal activity. His total offense level was 34 with a criminal history category of I. The guideline sentence was 151-188 months imprisonment, 3-5 years supervised release, a $17,500 to $1,000,000 fine, and a mandatory special assessment of $50.

Medrano-Perez objected to the PSI in his "Motion to Disclose and Produce Confidential Informants, Reassign Case to another Probation Officer and Written Objections to Presentence Report." The objections were: the statement attributed to Roy Payne that he and Victor Hugo Medrano were the owners of the marijuana; the statement that he was present at the stash house on September 8, 1989; the quantity of drugs attributed to him; and his role in the offense. At the sentencing hearing Medrano-Perez presented arguments on each objection.

---

[1] Medrano-Perez and Victor Hugo Medrano are brothers.

The district court sustained his first objection and had the statement and all inferences drawn from it stricken from the PSI. The court overruled his second and third objections. Finally, the court found that Medrano-Perez was not an organizer or leader and assessed only a 2-level increase for his role in the offense.

The district court attributed an offense level of 32 with a criminal history category of I to Medrano-Perez. He was sentenced to 121 months imprisonment, 3 years supervised release, and a $50 mandatory special assessment. Medrano-Perez filed a timely notice of appeal.

II.

On appeal, Medrano-Perez argues that the district court improperly attributed 1,843 pounds of marijuana to him based on the "wish" of his co-defendant Roy Payne to import that quantity.[2]

The district court's findings regarding Medrano-Perez's role in the offense and the quantity of drugs attributable to him are findings of fact reviewed under the clearly erroneous standard. 18 U.S.C. § 3742(e); *United States v. Thomas*, 870 F.2d 174, 176 (5th Cir. 1989). Under this standard, "[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of

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[2] Medrano-Perez argued three issues on appeal, all based on the fact that Medrano-Perez was assessed 1,843 pounds of marijuana under U.S.S.G. § 1B1.3. We treat the issues as one.

fact it would have weighed the evidence differently." *Anderson v. City of Bessemer,* 470 U.S. 564 (1985).

The district court is not bound by the quantity of drugs stated in the indictment when determining the actual quantity involved in the criminal activity. *United States v. Woolford,* 896 F.2d 99, 103 (5th Cir. 1990). "The guidelines make clear that in drug distribution cases quantities of drugs not specified in the count of conviction are to be included in determining the base offense level if they were part of the same course of conduct or part of a common scheme or plan as the count of conviction." *United States v. Byrd,* 898 F.2d 450, 452 (5th Cir. 1990) (citing U.S.S.G. § 1B1.3). In cases in which the criminal activity was taken in concert with others, the defendant will be held accountable for all conduct reasonably foreseeable. U.S.S.G. § 1B1.3, comment. (n.1). The government has the burden of proving that the conduct was reasonably foreseeable by a preponderance of the evidence. *United States v. Woods,* 907 F.2d 1540, 1543 (5th Cir. 1990), *cert. denied,* ___ U.S. ___, 1991 US LEXIS 624 (1991) (citing *United States v. Casto,* 889 F.2d 562, 569-70 (5th Cir. 1989), *cert. denied,* ___ U.S. ___, 110 S.Ct. 1164 (1990)).

The district court's finding attributing 1,843 pounds of marijuana to Medrano-Perez was not clearly erroneous. Although the district court found that there was insufficient evidence to establish that Medrano-Perez owned the marijuana, it found that he had organized and had a key to the stash house and recruited co-defendants Leonel Perez and Margarita Martinez to operate it.

In his statement, Leonel Perez said that he was recruited by Medrano-Perez to maintain the stash house in 1987; that he received instructions and payments from Medrano-Perez; that he had driven a load of marijuana to Denver for Medrano-Perez and Victor Hugo Medrano; and that he had driven approximately 5 loads of marijuana from Mexico to El Paso, Texas, for Medrano-Perez and Victor Hugo Medrano.

The PSI also established that Medrano-Perez was at the stash house on September 8 and helped Leonel Perez unwrap the 300 pounds of marijuana delivered by the government informants on September 7, 1989. Medrano-Perez returned the following day and left with approximately one-half of the 300-pound load.

The question of reasonable foreseeability in this case is a close one. Yet this court has found that reasonable foreseeability does not necessarily mean actual knowledge – Medrano-Perez could be assessed for 1,843 pounds of marijuana even without actual knowledge of subsequent shipments from Victor Hugo Medrano to Roy Payne. *See United States v. Warters*, 885 F.2d 1266, 1273 (5th Cir. 1989) (for purposes of determining reasonable conduct under U.S.S.G. § 1B1.3, "the district court will need to expressly determine not only the actual amount [of drugs] involved in the entire conspiracy . . . but also the amount . . . which defendant knew or should have known or foreseen was so involved"); *see also U.S. v. Aguilera-Zapata*, 901 F.2d 1209, 1215 (5th Cir. 1990) (court can infer, under U.S.S.G. § 1B1.3, that defendant should have foreseen co-defendant's possession of firearm during commission of narcotics offense if co-defendant knowingly possessed the firearm, and if there was a

sufficiently large quantity of narcotics to infer intent to distribute).

Finally, Medrano-Perez argued that he could not be assessed the entire 1,843 pounds because some of the marijuana was still in Mexico and it was uncertain when it would be sent to the United States. This court, however, has considered the primary ingredients of yet-to-be manufactured methamphetamine, when combined with past manufacturing conduct, to be part of the total amount of methamphetamine for purposes of the Guidelines. *United States v. Smallwood*, ___ F.2d ___, No. 90-5524 (5th Cir. January 3, 1991).

From the evidence the district court could reasonably infer that Medrano-Perez was actively involved in the continuing criminal enterprise. The district court could reasonably find by a preponderance of the evidence that because Medrano-Perez was responsible for recruiting Leonel Perez to maintain the stash house and for distributing one-half of the first load of marijuana, as well as giving instructions and payments to Leonel Perez for driving marijuana from Mexico to El Paso, Texas and from El Paso to Denver, Colorado, it was reasonably foreseeable that he would be actively involved in all future shipments.

The district court's adoption of the PSI finding attributing 1,843 pounds to Medrano-Perez, when considered in light of the facts of this case and relevant case law, was not clearly erroneous.

III.

For the foregoing reasons, we affirm the district court's sentence of Medrano-Perez.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-8211
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ROY LAWRENCE PAYNE, JR.

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(EP 89 CR 371 G)

(February 4, 1991)

Before KING, GARWOOD and DUHE, Circuit Judges.

PER CURIAM:*

Defendant-appellant Roy Lawrence Payne, Jr. (Payne) pleaded guilty to possession with intent to distribute more than fifty kilograms of marijuana, in violation of 21

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

U.S.C. §§ 963, 952(a), and 960(a)(1).[1] At sentencing, the district court set his base offense level at 30, in part because it attributed to him 1843 pounds of marijuana found to be involved in the entire conspiracy. The court then increased his sentence three levels, based on its finding that Payne was a manager or supervisor of the criminal activity, and decreased it two levels, based on his acceptance of responsibility for the criminal activity. On appeal, he challenges his sentence, contending that (1) the district court erroneously found his role in the offense to be managerial or supervisory, and (2) the court made an erroneous factual finding that 1843 pounds of marijuana were involved in the conspiracy, and wrongfully applied the United States Sentencing Guidelines (Guidelines) by considering the total quantity involved in the conspiracy in determining Payne's sentence. Finding no error in the sentence imposed by the district court, we affirm.

I.

Section 3B1.1(b) of the Guidelines authorizes a three-level increase in the defendant's offense level "[i]f the

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[1] The five additional counts with which he was charged were: (1) conspiracy to possess with intent to distribute more than fifty kilograms of marijuana; (2) conspiracy to import more than fifty kilograms of marijuana; (3) importation of more than fifty kilograms of marijuana (on or about December 19, 1988); (4) possession with intent to distribute more than fifty kilograms of marijuana; and (5) importation of more than fifty kilograms of marijuana (on or about September 7, 1989). The government agreed to dismiss these counts as part of a plea bargaining agreement.

defendant was a manager or supervisor . . . and the criminal activity involved five or more participants or was otherwise extensive . . . . " United States Sentencing Commission, *Guidelines Manual*, § 3B1.1(b) (Nov. 1990). The district court's findings regarding Payne's role in the offense are factual findings reviewable under the clearly erroneous standard. *United States v. Mejia-Orosco*, 867 F.2d 216, 221 (5th Cir.) (district court statement that defendant is "manager" or "leader" is finding of fact; more specific findings not required of district court judge), *reh'g denied*, 868 F.2d 807 (5th Cir.), *cert. denied*, 109 S.Ct. 3257 (1989).

The evidence supporting the district court's finding that Payne was a manager or leader in the conspiracy included two government informants' statements to Customs officials that Payne had hired them to import marijuana into the United States from Mexico, and the probation officer's testimony that Payne had told the drivers where to pick up the load, had supervised the crossing into the United States, and had directed the drivers to the stash house. Payne, moreover, admitted that he had arranged the importation of the marijuana. We find that this evidence provides ample support for the district court's finding that Payne was a manager or leader in the conspiracy.[2] The district court did not, therefore, err by allowing a three-level upward adjustment in Payne's sentence.

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[2] Although Payne objected at the sentencing hearing to his characterization in the presentence report (PSI) as a "manager" or "leader" in the conspiracy (which characterization formed the basis for the district court's sentencing decision), he was

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II.

Payne contends, additionally, that the district court erred in attributing to him the amount of marijuana found to be involved in the overall conspiracy, rather than the amount of marijuana mentioned in the count to which he pleaded guilty.[3] We disagree. As this court previously noted in *United States v. Sarasti*, 869 F.2d 805 (5th Cir. 1989), "[t]ypes and quantities of drugs not specified in the count of conviction may be considered in determining the offense level." *Id.* at 806 (quoting U.S.S.G. § 2D1.1, comment. (n.12). "The guidelines make clear that in drug distribution cases quantities of drugs not specified in the count of conviction are to be included in determining the base offense level if they were part of the same course of conduct or part of a common scheme or plan as the count of conviction." *United States v. Byrd*, 898 F.2d 450, 452 (5th Cir. 1990) (quoting U.S.S.G. § 1B1.3, commentary, 1.19 (January 15, 1988)). We find a sufficient evidentiary basis for the district court's conclusion that

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given an opportunity to refute the evidence contained in the PSI and declined. If the defendant does not offer rebuttal evidence, the district court can adopt the PSI's facts without a more specific inquiry or explanation, provided those facts have an adequate evidentiary basis. *United States v. Rodriguez*, 897 F.2d 1324, 1327-28 (5th Cir.), *cert. denied*, 111 S.Ct. 158 (1990).

[3] Payne argues that only 300 pounds of marijuana, the amount actually imported, should be considered in determining his basis offense level, rather than the 1843 pounds found by the district court to have been involved in the overall conspiracy.

Payne's possession of marijuana with intent to distribute was part of a larger scheme to import and distribute up to 1843 pounds of marijuana.[4] We find, therefore, that the district court did not err in attributing that amount to Payne.

The fact, moreover, that the negotiated distribution does not materialize does not prevent the court from relying on the negotiated amount in its sentencing determinations. U.S.S.G. § 2D1.4, comment. (n.1) ("If the defendant is convicted of an offense involving negotiation to traffic in a controlled substance, the weight under negotiation in an uncompleted distribution shall be used to calculate the applicable amount.").

Payne argues, finally, that the factual finding that 1843 pounds of marijuana were involved in the conspiracy was clearly erroneous. The district court based this finding on the PSI, which stated that the co-conspirators contemplated importing a total of approximately 835 kilograms of marijuana. In the absence of any rebuttal evidence on this issue,[5] the district court had discretion to adopt the PSI's facts without more specific inquiry or explanation, provided that those facts had an adequate evidentiary basis. *See Rodriguez*, 897 F.2d at 1327-28.

We find that the evidence before the trial court provided an adequate basis for the district court's conclusion that the co-conspirators intended to import up to 1600 pounds of marijuana during September, 1989. The

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[4] *See* evidentiary discussion, infra.

[5] The district court invited Payne to present evidence on this issue at the sentencing hearing and Payne declined.

evidence in the PSI established that in December, 1988, an informant hired by Payne was arrested for importing and possessing 243 pounds of marijuana. On September 6, 1989, two government informants told Customs officials that Payne had hired them to import 1600 pounds of marijuana in a series of shipments. On September 7, 1989, the informants, with the knowledge of and under the direction of FBI and Customs agents, successfully imported the first shipment of 300 pounds of marijuana.

From this evidence, and particularly given the absence of any rebuttal evidence, the district court could reasonably infer that the count of conviction was part of a common scheme or plan to import an additional 1600 pounds of marijuana, which, when added to the 243 pounds imported in December, 1988, totals the 1843 pounds attributed to Payne. Consequently, we find no error in the district court's finding that 1843 pounds of marijuana were involved in the conspiracy and in its attribution of this amount to Payne in calculating his base offense level.

III.

For the foregoing reasons, the sentence imposed by the district court is in all respects AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-8211 & 90-8218

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ROY LAWRENCE PAYNE,
Defendant-Appellant.

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UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JESUS JOSE MEDRANO-PEREZ,
Defendant-Appellant.

Appeals from the United States District Court for the Western District of Texas

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ON PETITION FOR REHEARING

(MARCH 25, 1991)

Before KING, GARWOOD, and DUHE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.